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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

PAULINE HORVATH,  
Plaintiff,  
v.  
DONALD C. WINTER, Secretary of the  
Navy,  
Defendant.

Case No. C 07-04952 JSW

**DEFENDANT DONALD C. WINTER'S  
MOTION TO DISMISS FOR LACK OF  
SUBJECT MATTER JURISDICTION  
(FRCP 12(b)(1))**

Date: February 15, 2008  
Time: 9:00 a.m.  
Courtroom 2, 17<sup>th</sup> Floor  
Hon. Jeffrey S. White

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**NOTICE OF MOTION**

TO PLAINTIFF APPEARING IN PROPRIA PERSONA:

PLEASE TAKE NOTICE that on February 15, 2008 at 9:00 a.m. in Courtroom 2 on the 17<sup>th</sup> Floor, United States Federal Court, 450 Golden Gate Avenue, San Francisco, California, before the Honorable Jeffrey S. White, United States District Judge, defendant Donald C. Winter will move the court for an order dismissing plaintiff's claims for lack of subject matter jurisdiction.

Pursuant to Civil Local Rule 7-3, plaintiff's opposition or statement of nonopposition must be served and filed no later than 21 days before the hearing date. If plaintiff serves the opposition by mail, it must be mailed three days before the due date, pursuant to Civil Local Rule 5-5.

This motion is made pursuant to Fed. R. Civ. P. 12(b)(1). The motion is based on this Notice, the attached Memorandum of Points and Authorities, the Declaration of Michael T. Pyle and the exhibits thereto, all the matters filed with the Court, and such other evidence as may be submitted and considered by the Court.

**ISSUES TO BE DETERMINED**

1. On March 26, 1999 United States District Judge Marilyn Patel issued an order requiring Plaintiff Pauline C. Horvath to seek leave of court "before she files any additional actions in this District involving any claims related to her employment with the United States Navy" and ordered that "the Clerk of the Court shall not accept for filing without an order of this court" any such complaint. Plaintiff's complaint in this action asserts "claims related to her employment with the United States Navy." Plaintiff did not obtain leave of court before filing her complaint and the clerk apparently accepted it for filing. Should plaintiff's complaint be dismissed or such other action as the court deems appropriate be taken in light of the court's March 26, 1999 order?
2. A federal employee seeking to pursue a complaint of discrimination is required to contact an Equal Employment Opportunity ("EEO") Counselor within the time frame set forth in 29 C.F.R. § 1614.105, which requires contact with an EEO Counselor within forty-five

1 days of the incident giving rise to the complaint. The Equal Employment Opportunity  
2 Commission (“EEOC”) dismissed plaintiff’s claims due to plaintiff’s failure to initiate  
3 EEO contact in a timely manner. Does this court lack subject matter jurisdiction over  
4 plaintiff’s complaint because of her failure to exhaust her administrative remedies?

## 5 MEMORANDUM OF POINTS AND AUTHORITIES

### 6 **I. INTRODUCTION**

7 Plaintiff Pauline C. Horvath’s complaint consists of a three page form “Employment  
8 Discrimination Complaint” which alleges violations of Title VII of the Civil Rights Act of 1964  
9 (“Title VII”), a statute which forbids discrimination in federal employment on the basis on race,  
10 color, religion, sex, and national origin. 42 U.S.C. § 2000e-2. Title VII also makes it unlawful  
11 for an employer to retaliate against an individual because he or she has made a charge of  
12 discrimination or opposed a discriminatory practice. *Id.* at § 2000e-3. Plaintiff attached several  
13 documents to her complaint and incorporated at least some of them into her complaint.

14 Plaintiff is a former employee of the Department of the Navy (“Navy”) who ceased her  
15 employment with the Navy in 1992. She has brought numerous EEO complaints against her  
16 former employer and brought several lawsuits against former Navy Secretaries, the latter filings  
17 leading Judge Patel in 1999 to issue an order requiring plaintiff to seek leave of court “before she  
18 files any additional actions in this District involving any claims related to her employment with  
19 the United States Navy” and ordered that “the Clerk of the Court shall not accept for filing  
20 without an order of this court” any such complaint. Plaintiff’s complaint falls within the scope  
21 of that order and the court should either dismiss the complaint or take such other action as the  
22 court deems appropriate.

23 Whatever the court does with regard to the 1999 order, however, plaintiff’s complaint  
24 should be dismissed because she was required by law to contact an EEO Counselor within forty-  
25 five days of the alleged discriminatory incidents, but plaintiff did not do so until years after the  
26 fact, well after forty-five days. Accordingly, plaintiff’s claims should be dismissed for lack of  
27 subject matter jurisdiction because she failed to timely exhaust her administrative remedies.  
28

1 **II. STATEMENT OF FACTS**

2 **A. Plaintiff's Employment and Litigation History Against the Navy.**

3 Plaintiff was employed by the Department of the Navy, as a Personnel Staffing  
4 Specialist at the GS-11 grade level. She worked at the Naval Aviation Depot ("NADEP"),  
5 located in Alameda, California until 1992. Plaintiff received disability retirement in September  
6 1993. The NADEP closed in September 1996 under the Base Realignment and Closure Act of  
7 1990. At various times since 1986, plaintiff has made EEO complaints against her former  
8 employer.

9 Moreover, plaintiff has previously filed at least five other actions in which she alleged  
10 that she was discriminated against and retaliated against based on her race and disability, with  
11 each of those actions arising from her former employment with, and disability retirement from,  
12 the United States Navy. Each of these lawsuits were ordered related and heard by United States  
13 District Judge Marilyn Patel: Actions 97-0088 MHP; 97-0441 MHP; 97-0534 MHP; 98-4562  
14 MHP; 98-4604 MHP. An Administrative Motion to relate the current case to these earlier cases  
15 is currently pending.

16 On March 26, 1999, Judge Patel issued an order requiring Plaintiff to seek leave of court  
17 "before she files any additional actions in this District involving any claims related to her  
18 employment with the United States Navy" and ordered that "the Clerk of the Court shall not  
19 accept for filing without an order of this court" any such complaint. *See* Declaration of Michael  
20 T. Pyle ("Pyle Decl.") at Exhibit 1.

21 **B. Plaintiff's Current Claims Against the Navy.**

22 On July 23, 1998, plaintiff initiated EEO contact, alleging discrimination on the basis of  
23 disability and reprisal for prior EEO activity. *See* Pyle Decl. at Exhibit 2. There were two claims  
24 in her formal complaint. On August 19, 1999, plaintiff converted her individual complaint into a  
25 class complaint. In plaintiff's class complaint, plaintiff alleged that she and other members of the  
26 purported class were victims of unlawful employment discrimination on the basis of disability  
27 and in reprisal for prior EEO activity when:  
28

1 (1) NADEP placed the names of employees who had filed EEO, Office of Workers  
2 Compensation, and/or Office of Personnel Management claims on a Command  
3 History “blacklist/hit list”, which was used to deny promotions and generally  
4 harass the employees whose names appeared on the list; and,

5 (2) NADEP discouraged employees whose names appeared on the “blacklist/hit  
6 list” from filing informal EEO complaints.  
7

8 Plaintiff’s class complaint has a complex procedural history. Upon completion of the  
9 EEO investigation, the Navy transferred the case to an EEOC Administrative Judge (“AJ”) to  
10 determine whether the class should be certified. An AJ dismissed the complaint on September  
11 18, 2001. Plaintiff appealed this dismissal. On September 3, 2003, the EEOC’s Office of Federal  
12 Operations (“OFO”) found the record was insufficiently developed to determine whether the class  
13 complaint satisfied the requirements to state a claim of class-based retaliation and as a result  
14 remanded the case to an AJ. On remand, the AJ dismissed the class complaint on two grounds.  
15 With regard to the first claim, the AJ found the claim failed to meet the numerosity, commonality,  
16 typicality, and adequacy of representation requirements to sustain a class action under 29 C.F.R. §  
17 1614.204(a)(2). The AJ dismissed the second claim as untimely. The Navy adopted the AJ’s  
18 recommendation in its final agency decision on November 17, 2004.  
19

20 **C. Plaintiff’s Appeal of the Final Agency Decision.**

21 Plaintiff initiated a timely appeal from the agency’s final decision. In a decision dated  
22 April 16, 2007, the OFO determined that the AJ erred in addressing the question of class  
23 certification on the first claim because the pertinent issue was whether plaintiff made timely  
24 contact with an EEO Counselor. With respect to the first claim the OFO found that the adverse  
25 action that gave rise to this claim involved plaintiff’s non-selection for promotion in 1989/90.  
26 Given that plaintiff did not initiate EEO contact until July 23, 1998, OFO dismissed this claim for  
27 untimely EEO contact.  
28



1 With respect to the second claim involving an allegation that NADEP discouraged those  
2 whose names appeared on the "blacklist/hit list" from filing EEO complainants, OFO found that  
3 the adverse action giving rise to this claim took place in 1994. Given that plaintiff did not  
4 initiate EEO contact until July 23, 1998, well beyond the forty-five day limit, OFO also dismissed  
5 this claim and the complaint in its entirety. *See* Pyle Decl. at Exhibit 3.

6 Plaintiff initiated a timely request for reconsideration of OFO's April 16, 2007, decision  
7 dismissing the complaint. *See* six page 5/18/07 letter attached as exhibit to complaint. The OFO  
8 denied plaintiff's request on June 21, 2007, because it found her request failed to meet the criteria  
9 of 29 C.F.R. § 1614.405(b). *See* Pyle Decl. at Exhibit 4.

#### 10 **D. Plaintiff's District Court Complaint**

11 After receiving the June 21, 2007 decision from the OFO, plaintiff filed a complaint in  
12 the district court against Donald C. Winter, in his official capacity as Secretary of the Navy.

13 Plaintiff's district court complaint against the Navy appears to allege the same two claims  
14 that were dismissed by the OFO on April 16, 2007 as having been untimely. *See* Paragraph 4 of  
15 plaintiff's complaint (checking box "c" for "failure to promote me" and box "d" for "being  
16 blacklisted with other Navy employees who have filed an EEO complaint"). Paragraph 7 of  
17 plaintiff's complaint alleges that the alleged discrimination against her occurred "on or about  
18 1986 and thereafter."

### 19 **III. ARGUMENT**

20 Defendant brings this motion to dismiss pursuant to Rule 12(b)(1), a rule which permits  
21 the court to consider the evidence attached to a declaration accompanying the motion. *Roberts v.*  
22 *Carrothers*, 812 F.2d 1173, 1177 (9<sup>th</sup> Cir. 1987). Plaintiff is the one who bears the burden of  
23 establishing subject matter jurisdiction since she is the one seeking to invoke the court's  
24 jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S.Ct. 1673  
25 (1994); *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1099 (9<sup>th</sup> Cir. 2002). Plaintiff must furnish  
26 affidavits or other evidence in order to satisfy her burden of establishing subject matter  
27 jurisdiction. *Savage v. Glendale Union High School*, 343 F.3d 1036, 1039 n.2 (9<sup>th</sup> Cir. 2003).

#### 28 **A. This Court's March 26, 1999 Order.**

1 Defendant submits that, as a preliminary matter, the court should consider what actions to  
2 take, if any, regarding compliance with the court's March 26, 1999 order. *See* Pyle Decl. at  
3 Exhibit 1. While Defendant respectfully submits that the court should dismiss the complaint for  
4 failure to comply with the March 26, 1999 Order defendant recognizes that the court has  
5 discretion to determine what actions, if any, to take with regard to its Order. For example, the  
6 court could presumably inquire through an Order to Show Cause as to whether or not plaintiff  
7 previously raised the claims and issues in this suit in one or more of her earlier suits and, if not,  
8 why she did not do so given that she had cases against the Navy pending when she claims to have  
9 first learned of the alleged "blacklisting" evidence.

10 Regardless of what the court decides is appropriate with respect to the March 26, 1999  
11 order, Defendant respectfully submits that this court lacks subject matter jurisdiction over the  
12 complaint because of plaintiff's failure to timely exhaust administrative remedies.

13 **B. This Court Lacks Subject Matter Jurisdiction Over Claims For Which**  
14 **Plaintiff Has Failed To Timely Exhaust Administrative Remedies.**

15 Plaintiff's claims of discrimination should be dismissed for lack of subject matter  
16 jurisdiction because plaintiff failed to timely exhaust her administrative remedies. Title VII  
17 specifically requires a federal employee to exhaust her administrative remedies as a statutory  
18 precondition to suit. *Brown v. General Serv. Administration*, 425 U.S. 820, 832-33, 96 S.Ct. 1961  
19 (1976); *Vinieratos v. Dept. of the Air Force*, 939 F.2d 762, 767-68 (9th Cir. 1991). If a plaintiff  
20 has not exhausted her administrative remedies, there is no subject matter jurisdiction over the  
21 Title VII claim. *B.K.B.*, 276 F.3d at 1099.

22 Plaintiff failed to timely exhaust her administrative remedies because she failed to initiate  
23 EEO contact within the required period, and thus these claims were properly dismissed by the  
24 EEOC on April 16, 2007, as untimely. A federal employee seeking to pursue a complaint of  
25 discrimination must to contact an EEO counselor "within 45 days of the matter alleged to be  
26 discriminatory, or in the case of a personnel action, within 45 days of the effective date of the  
27 action." 29 C.F.R. § 16104.105(a)(1). Failure to contact an EEO counselor within the time  
28 specified precludes a federal employee from pursuing her claim in federal court. *Boyd v. U.S.*

1 *Postal Service*, 752 F.2d 410, 414-15 (9th Cir. 1985); *see also Lyons v. England*, 307 F.3d 1092,  
 2 1105 (failure to initiate timely EEO contact is “fatal to a federal employee’s discrimination  
 3 claim.”). It is undisputed that plaintiff did not seek to file an EEO complaint until July 23, 1998,  
 4 four years after she believed that she was discouraged her from filing EEO complaints, and nearly  
 5 eight years after the latest non-selection for promotion of which she complains. Consequently,  
 6 plaintiff’s failure to initiate EEO contact is fatal to her claims unless she can establish mitigating  
 7 circumstances under the doctrine of equitable tolling.<sup>1</sup> *Leorna v. U.S. Dept. of State*, 105 F.3d  
 8 548, 551 (9th Cir.1997) (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)).

9 Plaintiff contends that her claims are timely because she first became aware of the  
 10 “blacklist/hit list” on June 14, 1998, and filed her complaint on July 23, 1998, within the forty-  
 11 five day limit.<sup>2</sup> But fatal to her case is the fact that, as plaintiff candidly acknowledges, she did  
 12 not file a complaint within forty-five days following her non-selection for any promotion, nor did  
 13 she file a complaint within forty-five days following any instance that she was allegedly  
 14 discouraged from filing an EEO complaint.

15 In *National Railroad Passenger Corp. v. Morgan*, the Supreme Court explained that acts  
 16 that are easily identifiable such as termination, failure to promote, and refusal to hire, are  
 17 considered discrete acts, each constituting a separate actionable unlawful employment practice for  
 18 which the limitations period begins to run from the date on which the underlying act occurs. 536

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20 <sup>1</sup> 29 C.F.R. § 1614.105(a)(2) permits untimely complaints where plaintiff “was not  
 21 notified of the time limits in which to file her complaint, or otherwise was not aware of them,  
 22 that she did not know and reasonably should not have known that the discriminatory matter or  
 23 personnel action occurred, that despite due diligence she was prevented by circumstances  
 24 beyond her control from contacting the counselor within the time limits, or for other reasons  
 25 considered sufficient by the agency or the Commission.” The doctrines of waiver and estoppel  
 26 may also toll the filing period. *Boyd*, 752 F.2d at 414-415. However, as plaintiff has given no  
 27 indication that her claims should be tolled under either of these doctrines, they are not addressed  
 28 in this motion.

<sup>2</sup> Defendant relies on the date of June 14, 1998 as the date plaintiff alleges she became  
 aware of the “blacklist/hit list”, which is taken from plaintiff’s initial complaint dated July 23,  
 1998, rather than the July 1998 date cited in plaintiff’s district court complaint. *See* Attachment 1  
 to district court complaint “Request to Reconsider EEO Appeal” at p.1.

1 U.S. 101, 114, 122 S.Ct. 2061 (2002). In *Morgan* the Court explained that “[e]ach discrete  
2 discriminatory act starts a new clock for filing charges alleging that act.” *Id.*

3 Plaintiff alleges that she was denied promotions and discouraged from filing EEO  
4 complaints because her name appeared on an alleged “blacklist/hit list”. The heart of plaintiff’s  
5 complaint involves the individualized use of the alleged “blacklist/hit list” to discriminate against  
6 employees whose names appeared on the list by denying them promotional opportunities and by  
7 discouraging them from filing EEO complaints. Such individualized decisions are discrete acts,  
8 each constituting a separate actionable employment practice for purposes of determining the time  
9 limit in which plaintiff should have initiated EEO contact. *Cf. Cherosky v. Henderson*, 330 F.3d  
10 1243, 1247 (9<sup>th</sup> Cir. 2003) (rejecting plaintiffs’ argument that the existence of discriminatory  
11 policy extends the statute of limitations for otherwise untimely claims). Thus, plaintiff’s duty to  
12 initiate EEO contact was triggered each time plaintiff was not selected for promotion or was  
13 discouraged from filing an EEO complaint. Given that the NADEP closed in 1996, and plaintiff  
14 did not initiate EEO contact until July 1998, all plaintiff’s claims should be considered time-  
15 barred. Accordingly, plaintiff should be precluded from pursuing these claims in District Court.

16 The doctrine of equitable tolling may be applied to save an otherwise untimely claim  
17 where a plaintiff’s failure to comply with the time limitations resulted because the plaintiff had:  
18 (1) “neither actual nor constructive notice of the filing period,” or, (2) “would not have known of  
19 the existence of a possible claim within the limitations period.” *Johnson v. Henderson*, 314 F.3d  
20 409, 414 (9<sup>th</sup> Cir. 2002). Plaintiff was well-aware of the filing period because throughout the  
21 course of the ten years preceding the present complaint, plaintiff had filed numerous EEO  
22 complaints against her former employer, many of which included charges of retaliation.<sup>3</sup> As the  
23 OFO decision dismissing plaintiff’s complaint duly noted, “complainant was knowledgeable  
24 about requirements for timely counselor contact because she had filed a previous complaint.”

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25  
26 <sup>3</sup> At the time plaintiff filed her formal complaint in this matter, she had previously filed  
27 numerous complaints of discrimination involving her employment at NADEP beginning in 1986,  
28 five of which included charges of retaliation. Plaintiff’s federal court complaints include: (1) C-  
97-00088 MHP; (2) C-97-00441 MHP; (3) C-98-4604 MHP; (4) C-98-4562 MHP; and (5) C-97-  
0534 MHP.

Therefore, plaintiff must be charged with constructive knowledge of what was required to preserve her rights. *See Shepard v. Winter*, No. C06-5463 RBL, 2007 WL 3070495 at \*7 (W.D. Wash. Oct. 19, 2007) (finding doctrine of equitable tolling inapplicable where plaintiff had previously sought EEO counseling and filed formal EEO complaints). Additionally, a reasonable person with plaintiff's extensive EEO history should not have only known the time limit for initiating EEO contact, but also knew or should have known that any non-selection for promotion, or instance in which she was allegedly discouraged from filing an EEO complaint, may have been retaliatory, since no fewer than five of her federal complaints alleged retaliation.<sup>4</sup> Consequently, as plaintiff has made no case for the filing period to be tolled beyond the forty-five day limit, any argument for equitable tolling must fail and her complaint should be dismissed.

#### IV. SUMMARY AND CONCLUSION

Defendant submits that the court should dismiss the complaint in reliance on the court's March 26, 1999 order. Regardless, plaintiff's claims should be dismissed for lack of subject matter jurisdiction because plaintiff failed to timely exhaust her administrative remedies in that she failed to contact an EEO Counselor in a timely manner. Plaintiff's failure to do so is inexcusable in light of her long history of EEO complaints and litigation.

Plaintiff has not been employed by the Navy since 1992 and in this lawsuit she seeks redress for events dating back to 1986. It is time to bring an end to plaintiff's litigation against the Navy. Plaintiff's Complaint should be dismissed.

Respectfully submitted,

SCOTT N. SCHOOLS  
United States Attorney

Dated: December 26, 2007

/s/

MICHAEL T. PYLE  
Assistant United States Attorney

ROBYN L. MCNISH

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<sup>4</sup> *Id.*

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